

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Media Bureau Seeks Comment on the)	MB Docket No. 15-158
Status of Competition in the Market)	
for the Delivery of Video)	
Programming)	

To: Media Bureau

Comments of FilmOn X, LLC

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	DISCUSSION	2
	A. New OVD Entrants Have Encountered Difficulties In Exercising Rights To Statutory Copyright Licenses That Enable Them To Compete With Incumbent MVPDs.....	4
	B. By Virtue Of Their MVPD Status, MVPDs Enjoy Certain Regulatory Advantages That OVDs Do Not Yet Share.....	10
III.	CONCLUSION	12

EXECUTIVE SUMMARY

FilmOn X, LLC (“FilmOn X”), an independent online distributor of multiple channels of linear and on-demand programming, submits these comments to highlight certain regulatory constraints that are hindering competition for video programming services. While Internet access services have proliferated with a light-touch regulatory approach from the Commission, the current marketplace reveals competitive imbalances and barriers to entry that are slowing the migration of high-value marquee video programming to the Internet. To facilitate the growth and development of competitive video programming services, FilmOn X encourages the Commission to promote competitive parity between online video distributors (“OVDs”) and incumbent multichannel video programming distributors (“MVPDS”).

At present, new OVDs such as FilmOn X have encountered difficulties in exercising statutory rights to copyright licenses due to uncertainty over their regulatory status. FilmOn X and other new entrants have faced crippling litigation costs when they have sought to take advantage of the same copyright licenses that have benefited incumbent MVPDs for years. Additionally, incumbent MVPDs have benefited from rules and regulations that provide them with negotiating rights to content and other distribution-related rights that are currently unavailable to new OVDs that deliver video programming services over the Internet. To correct these competitive imbalances at a time when consumers increasingly expect and demand access to video

programming services over the Internet, the Commission should promote regulatory parity between independent OVDs and incumbent MVPDs.

FilmOn X agrees with the Commission's tentative conclusion that certain OVDs are "multichannel video programming distributors" for purposes of the Communications Act. It further urges the Commission to apply a light regulatory touch to Internet-based video services where the provider is not also providing the transmission path.

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I. INTRODUCTION

FilmOn X, LLC ("FilmOn X"), by counsel and pursuant to Sections 1.415 and 1.419 of the Commission's rules,¹ submits its comments in response to the Media Bureau's Public Notice regarding the Commission's 17th Report on the state of competition in the delivery of video programming. As an online distributor of multiple channels of linear and on-demand video programming, FilmOn X brings a unique offering to a quickly evolving marketplace. Online video distribution is the present and the future for video programming, and sound Commission policy and a light regulatory touch are needed to facilitate vibrant and effective competition in this nascent marketplace. FilmOn X submits these comments to highlight its role in the marketplace and to discuss certain regulatory constraints that are hindering competition for video

¹ *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, Public Notice, DA 15-784 (rel. July 2, 2015) ("Public Notice").

programming services. FilmOn X previously expanded on many of the points discussed herein in its initial and reply comments in response to the Commission's Notice of Proposed Rulemaking in *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261 (rel. Dec. 19, 2014) ("MVPD NPRM").

II. DISCUSSION

At the forefront of the burgeoning market for online video, FilmOn X and others are providing new opportunities to deliver a variety of popular, independent and niche video programming choices to consumers. FilmOn X customers bring their choice of broadband connection to the FilmOn X platform, and FilmOn X offers its content via these Internet Protocol-based transmission paths. FilmOn currently offers about 735 channels of video programming. Unlike online video distributors ("OVDs") that are affiliated with broadcast networks or large cable companies,² FilmOn X is an independent programming voice that is bringing new video programming to market, including a variety of niche and specialized programs.³ FilmOn X differentiates its

² For example, the Media Bureau notes that "Hulu and Hulu Plus are a joint venture of News Corporation, NBCUniversal, and The Walt Disney Company" and that Sling TV is owned by DISH Network. Public Notice at 7, n. 49.

³ FilmOn X's offerings include channels of video programming from around the world such as Teos from Italy, France 24 from France, Gala TV from the UK, Caribbean channels and many in-language offerings from France, Germany, Italy, Vietnam, Russia and the Middle East. It carries emerging and minority-owned networks such as TVC-Latino, Mixed Media Network, Gospel Music Channel, along with many religious

service by offering distinctive content offerings at broadband speeds, but the service has many similarities to offerings from traditional multichannel video programming distributors (“MVPDs”).

The Commission would consider FilmOn X an OVD under the analytical approach used in previous reports on the state of competition in the delivery of video programming; however, the Media Bureau also acknowledges that “we recognize that our definition of OVD may need to evolve in light of developments in the evolving video marketplace.”⁴ Indeed, the 17th Report is borne out of the forward-looking goals of the 1992 Cable Act, which directs the Commission to “promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and *to spur the development of communications technologies.*”⁵

channels like JCTV, The Walk, Daystar and TBN, and public interest channels like NASA, DVIDs TV, Biz TV, Voice of America and Classic Arts Showcase.

⁴ “The Commission has in the past defined an ‘OVD’ as any entity that offers video content by means of the Internet or other Internet Protocol (IP)-based transmission path provided by a person or entity other than the OVD.” Public Notice n. 8.

⁵ 1992 Cable Act, Pub. L. No. 102-385, 106 Stat. 1460, 1494 (1992)(emphasis added).

The Commission has tentatively concluded that certain OVDs are MVPDs for purposes of the Communications Act.⁶ FilmOn X agrees with the FCC’s tentative conclusion, which reflects a policy of technological neutrality and a common-sense application of the statute. As Internet Protocol-based delivery untethered from the underlying distribution network increasingly becomes the norm for the delivery of video services, the Commission must update its analytical framework to properly assess competitive conditions in the marketplace.

While high costs can raise high barriers to entry, other barriers occur because “video programming” is produced, licensed and distributed under extensive regulatory requirements, including those in the Communications Act and the Copyright Act. Some of these regulations are constraining robust competition in the marketplace for video programming. FilmOn X addresses key constraints below.

A. New OVD Entrants Have Encountered Difficulties In Exercising Rights To Statutory Copyright Licenses That Enable Them To Compete With Incumbent MVPDs.

The Public Notice requests “data, information and comment on regulatory and marketplace conditions that affect OVDs’ ability to compete for the delivery of video

⁶ MVPD NPRM. The Commission’s “Linear Programming Interpretation” would mean that linear video programming networks would be considered “channels” for purposes of the MVPD definition used in the Communications Act of 1934, as amended, regardless of whether the provider also makes available physical transmission paths. Under the FCC’s approach, “subscription linear” distributors – defined as distributors “that make available continuous, linear streams of video programming on a subscription basis” – would qualify as MVPDs under the Communications Act. *See* 47 U.S.C. § 522(13); MVPD NPRM, ¶ 13.

programming.”⁷ The proliferation of broadband Internet access services has facilitated consumer demand for high-quality video programming. While there is a vibrant and growing marketplace for online video, in FilmOn X’s experience, the online marketplace for “video programming”⁸ has been much more constrained. As a subset of the marketplace for online video, marquee video programming – programming with high production values and high consumer demand – can be expensive to produce but also expensive to license.

To compete effectively against large incumbent MVPDs, many Internet-based services would flourish if they were able to provide customers with a suite of such high-quality marquee video programming. Unfortunately, OVDs “encounter unique issues (relative to MVPDs and broadcast stations) when acquiring content rights.”⁹ The Copyright Office and the courts¹⁰ have been slow to recognize that Internet-based retransmission services are entitled to the same statutory rights as more established cable systems. As a result, FilmOn X and other OVDs have been hindered from competing with such MVPDs in the market for access to broadcast video programming.

⁷ Public Notice at 15.

⁸ The Communications Act defines “video programming” as “[p]rogramming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and is exhibited for residential use.” 47 U.S.C. §522(20).

⁹ Public Notice at 16.

¹⁰ See *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2nd Cir. 2012) (affirming a preliminary injunction against a transmission service that delivered broadcast programming over the Internet on the ground that the service was not likely to prevail on its defense under 17 U.S.C. Section 111).

Under the Copyright Act, established MVPDs have benefited from a statutory copyright license to broadcast programming, which eliminates the need to negotiate innumerable private licenses with copyright holders with rights in that programming. Section 111(c)(1) of the Copyright Act provides that “secondary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission ... shall be subject to statutory licensing upon compliance with [Section 111(d)] where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission.” While incumbent MVPDs have enjoyed the privileges of statutory licensing for years, the Copyright Office has expressed policy concerns about extending that license to services that deliver broadcast video programming over the Internet, at least in the absence of affirmative FCC regulation of such services. Thus, although the Copyright Office has not issued a rule or regulation on the subject, it has been reluctant to fully process statements of account and royalty payments submitted by Internet-based services attempting to obtain statutory licensing.¹¹ In turn, the major

¹¹ See, e.g., Letter from Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, U.S. Copyright Office, to Alex Hartman, FilmOn.com, Inc. (December 7, 2011) (accepting statement of account filings on a “provisional basis”); Letter from Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, U.S. Copyright Office, to Yelena Calendar, FilmOn X, LLC (July 23, 2014) (stating that the “Office will not refuse FilmOn’s filings but will instead accept them on a provisional basis”); Letter from Jacqueline C. Charlesworth, General Counsel and

broadcast networks have aggressively pursued copyright infringement actions against start-ups like FilmOn X and Aereo, Inc. (“Aereo”) that have attempted to provide consumers with access to broadcast content over the Internet.¹² Ultimately, the Copyright Office has deferred to the courts to decide whether such services are entitled to a copyright license.¹³ The resulting legal uncertainties and the crippling expense of

Associate Register of Copyrights, U.S. Copyright Office, to Matthew Calabro, Director of Financial Planning & Analysis and Revenue, Aereo, Inc. (July 16, 2014) (accepting Aereo’s filings on a “provisional basis”).

¹² FilmOn X is currently a defendant in litigation filed by the major broadcast networks in California and the District of Columbia. (See *Fox Television Stations, Inc. v. FilmOn X, LLC*, Case No. 2:12-cv-06921, consolidated with *NBCUniversal Media, LLC v. FilmOn X, LLC*, Case No. 2:12-cv-06950, in United States District Court for the Central District of California; *Fox Television Stations, Inc. v. FilmOn X, LLC*, Case No. 13-758-RMC, in United States District Court for the District of Columbia.) Aereo was sued in New York, Massachusetts and Utah. (See *American Broad. Cos., Inc. v. Aereo, Inc.*, Case No. 12-1540-AJN, in United States District Court for the Southern District of New York; *Hearst Stations Inc. v. Aereo, Inc.*, Case No. 13-11649-NMG, in United States District Court for the District of Massachusetts; *Community Television v. Aereo, Inc.*, Case No. 13-00910, in United States District Court for the District of Utah.)

¹³ See, e.g., Letter from Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, U.S. Copyright Office, to Alex Hartman, FilmOn.com, Inc. (December 7, 2011) (recognizing that “your company is presently involved in litigation regarding whether or not FilmOn.com, Inc. is a ‘cable system’ as that term is defined in Section 111 of the Copyright Act. Until this question is resolved your statements of account will be considered on a provisional basis. If the courts find that your company meets the qualifications of the cable statutory license, the Office will process your statements of account accordingly. However, if the courts ultimately decide that you are ineligible to use the statutory license, the statements of account will be void and your royalty payments will be refunded.”); Letter from Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, U.S. Copyright Office, to Yelena Calendar, FilmOn X, LLC (July 23, 2014) (stating that “[i]n recognition that the question of eligibility of internet-based retransmission services for the Section 111 license appears to have been raised again before the courts, . . . the Office will not refuse FilmOn’s filings but will instead accept them on a provisional basis.”); Letter from Jacqueline C.

litigation have hindered the growth of competitive multichannel video programming services over the Internet.¹⁴

FilmOn X submits that recent legal developments make it clear that companies that meet the legal definition of a “cable system” under Section 111(f)(3) of the Copyright Act are entitled to a compulsory license, regardless of whether they use the Internet to deliver broadcast programming to consumers. In July 2014, the Supreme Court in *American Broadcasting Companies, Inc. v. Aereo, Inc.* (“*Aereo*”)¹⁵ recognized that Aereo, which delivered broadcast programming to consumers over the Internet, is “substantially similar”¹⁶ to a cable system within the meaning of the Copyright Act. The Court adopted a technology agnostic interpretation of this statute, reasoning that the mere “substitut[ion] of new technologies for old” does not take cable systems out of the comprehensive statutory scheme established by Congress.¹⁷ The Court repeatedly compared Aereo to traditional cable systems and dismissed minor technical distinctions between its retransmission technologies and older technical systems as legally

Charlesworth, General Counsel and Associate Register of Copyrights, U.S. Copyright Office, to Matthew Calabro, Director of Financial Planning & Analysis and Revenue, Aereo, Inc. (July 16, 2014) (same).

¹⁴ On November 21, 2014, Aereo filed to reorganize under Chapter 11 of the U.S. Bankruptcy Code.

¹⁵ 134 S.Ct. 2498, 2501 (2014).

¹⁶ Notably, the Copyright Office has stated “that new systems that are *substantially similar* to those systems that already use Section 111, should be subject to the license.” U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act Section 109 Report, pp. xi–xii (June 2008).

¹⁷ *Aereo*, 134 S.Ct. at 2509.

immaterial.¹⁸ Although the Court did not decide whether Aereo was entitled to a statutory copyright license, the *Aereo* decision indicates that the Copyright Act should not be interpreted in such a manner that discriminates against Internet-based retransmission services.

On July 24, 2015, the Honorable George H. Wu in the U.S. District Court for the Central District of California ruled that the compulsory copyright license set forth in 17 U.S.C. Section 111(c) is available to FilmOn X's Internet-based retransmission service.¹⁹ The court also concluded that the Copyright Office's opposition to the extension of the Section 111 license to Internet retransmission services is not grounded in the statutory text or congressional intent of the Copyright Act, but instead is based on policy views, to which the Court declined to defer.²⁰ While this decision has been appealed, it illustrates that the legal system is finally catching up with technological developments that are leading consumers to expect and to demand access to video programming over their Internet connection. Nevertheless, the lack of legal clarity to date has burdened new business models and has slowed competition and new entry in this marketplace. Thus, OVDs face a "unique issue" relative to MVPD competitors that enjoy the benefits

¹⁸ See *id.* at 2511 ("In sum, having considered the details of Aereo's practices, we find them highly similar to those of the CATV systems in *Fortnightly* and *Teleprompter*. And those are activities that the 1976 amendments sought to bring within the scope of the Copyright Act."); *id.* at 2507 (discussing "Aereo's overwhelming likeness to the cable companies targeted by the 1976 amendments") (emphasis added).

¹⁹ *Fox Television Stations, Inc. v. AereoKiller*, 2015 WL 4477797 (C.D. Cal. July 16, 2015).

²⁰ *Id.* at *9-11.

of Section 111 licensing.

The Copyright Office has expressed a willingness to reconsider its policy views in light of “further regulatory or judicial developments.”²¹ As described below, FilmOn X believes that the FCC’s proposal²² to adopt a technology-neutral interpretation of an MVPD would warrant such reconsideration by the Copyright Office.

B. By Virtue Of Their MVPD Status, MVPDs Enjoy Certain Regulatory Advantages That OVDs Do Not Yet Share.

Another marketplace imbalance with regulatory underpinnings is that while video distributors defined as “MVPDs”²³ under the Communications Act must comply with a variety of regulatory obligations, they also have certain advantages in negotiating rights to content. For example, incumbent MVPDs are entitled to negotiate with program suppliers for certain distribution rights, whether through the program access rules or the retransmission consent rules. By contrast, new providers face

²¹ See, e.g., Letter from Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, U.S. Copyright Office, to Yelena Calendar, FilmOn X, LLC (July 23, 2014) (“We also note the pendency of a proceeding before the Federal Communications Commission concerning whether internet-based services may be treated as ‘multichannel video programming distributors’ for purposes of communications law, the outcome of which could impact the analysis under Section 111, as Section 111 limits the statutory license to retransmission services that are ‘permissible under the rules, regulations, or authorizations’ of the FCC”).

²² MVPD NPRM.

²³ The Communications Act defines MVPD as “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.” 47 U.S.C. § 522(13).

artificial regulatory barriers that discourage innovation and disadvantage new providers over entrenched incumbents.

The FCC has proposed “to interpret the term MVPD to mean all entities that make available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time.”²⁴ This approach would further help ensure that “nascent, Internet-based video programming services [would] have access to the tools they need to compete with established providers.”²⁵ “[L]inear video programming networks, such as ESPN, The Weather Channels, and other sources of video programming that are commonly referred to as television or cable ‘channels,’ would be considered ‘channels’ for purposes of the MVPD definition, *regardless of whether the provider also makes available physical transmission paths.*”²⁶ This interpretation would clarify that OVDs such as FilmOn X are MVPDs for purposes of the Communications Act. Such an action would comport with Congressional intent to promote the availability of diverse video distribution media and would help promote the development of new technologies.

Simple reclassification is not enough, however. Unless the FCC applies a light regulatory touch to Internet-delivered video services, compliance burdens may create entry barriers that inhibit new competition. For example, certain traditional MVPD

²⁴ MVPD NPRM, ¶ 13.

²⁵ *Id.*, ¶ 1.

²⁶ *Id.*, ¶ 17.

regulations simply cannot apply to a provider that does not own or control the transmission path to the customer. FilmOn X and other similarly situated MVPDs should be subject to substantially the same rights and responsibilities under the rules governing program access and must carry/retransmission consent as “traditional” MVPDs. The Commission’s approach should carefully consider new technologies and their differences from incumbent services that are not predicated on the ownership or control over certain infrastructure. Accordingly, FilmOn X has urged the Commission to adopt a technology neutral interpretation of an MVPD and to adopt a light regulatory approach towards Internet-based MVPDs.

III. CONCLUSION

FilmOn X and other independent online video providers face unique challenges in competing with incumbent MVPDs. In these comments, FilmOn X focuses on regulatory challenges that are unique to independent online video providers and urges the Bureau to ensure that the 17th Report reflects a quickly shifting marketplace. FilmOn X is confident that the tide is turning for U.S. Copyright Law and that a Section 111 copyright license ultimately will be available for online video providers. In terms of the Commission’s purview, while Internet access services have proliferated with a light-touch approach from the Commission, the current marketplace reveals competitive imbalances and barriers to entry that are slowing the migration of high-value video programming to the Internet. MVPD status would help promote competitive parity

between independent providers and incumbent MVPDs, all to the benefit of consumers and in a manner that comports with U.S. Copyright Law. In 2014, however, regulatory imbalances and the attendant uncertainty have deprived consumers of valuable independent sources of video programming and the benefits of robust competition in this marketplace. FilmOn X requests that the Bureau's 17th Report reflects these competitive conditions as a foundation for Commission policy going forward.

Respectfully submitted,

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